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10 EMC MORTGAGE CORPORATION

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**UNITED STATES BANKRUPTCY COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**

In re

OCEANA R STUART,

Debtor

Case No.: BK NO. 09-11901

(Chapter 7)

JUDGE: Hon. Alan Jaroslovsky

**OPPOSITION TO DEBTOR'S MOTION  
FOR SANCTIONS AND FOR  
CONTEMPT FOR VIOLATION OF  
DISCHARGE INJUNCTION AND  
COURT ORDER; AND DECLARATION  
OF SHARI MIDDLEBROOKS IN  
SUPPORT THEREOF**

[Filed concurrently with a Request for Judicial Notice]

Date: June 4, 2010

Time: 10:00 a.m.

Crtrm: Santa Rosa Courtroom

Respondent EMC Mortgage Corporation ("EMC") hereby submits the following in opposition to the Motion for Sanctions and for Contempt for Violation of Discharge Injunction and Court Order of Debtor Oceana R Stuart ("Debtor").

**MEMORANDUM OF POINTS AND AUTHORITIES**

I. **SUMMARY OF ARGUMENT**

Plaintiff seeks an order of contempt against EMC as well as damages in the sum of \$5,000

1 for attorney's fees. Plaintiff contends that EMC knowingly attempted to collect from the debtor,  
2 personally, sums in connection with a loan secured by a deed of trust. However, Plaintiff's Motion  
3 should be denied since EMC did not undertake any acts above and beyond those to effectuate  
4 foreclosure against the Subject Property. Indeed, the letter upon which Plaintiff relies does not  
5 include any demand for payment from Debtor or threat against Debtor in connection with a demand  
6 for payment. Accordingly, Plaintiff's Motion should be denied in its entirety.  
7

## II. SUMMARY OF RELEVANT FACTS

8 EMC is the servicer of the subject loan, attorney in fact, and the custodian of the same for  
9 The Bank of New York Mellon Formerly Known as the Bank of New York as successor Trustee to  
10 JPMorgan Chase Bank, N.A. as trustee for the Certificateholders of Structured Asset Mortgage  
11 Investments II Trust 2004-AR7 Mortgage Pass-Through Certificates, Series 2004-AR7 ("Bank of  
12 New York"). (Declaration of Shari Middlebrooks ("Middlebrooks Decl."), ¶ 1.)  
13

14 On or about October 7, 2009, Bank of New York filed a Motion for Relief from Automatic  
15 Stay ("Motion for Relief") in connection with the subject loan. (Request for Judicial Notice  
16 ("RJN"), Exhibit 1; *see also*, Court's Docket No. 14). Pursuant to the Motion for Relief from  
17 Automatic Stay, Bank of New York requested relief from the automatic stay to enforce its rights  
18 under the subject loan and deed of trust against the Subject Property. *Id.* The Motion for Relief  
19 From Automatic Stay was heard on November 25, 2009 and the Court granted the Motion. (RJN,  
20 Exhibit 2; *see also*, Court's Docket). On December 15, 2009, the Court entered the order granting  
the Motion for Relief, specifically ordering:

21 1. The automatic stay of 11 U.S.C. § 362, shall be terminated effective December 25,  
22 2009 as it applies to the enforcement by Movant of all of its rights in the Real  
23 Property under Note and Deed of Trust, and pursuant to applicable state law;  
24  
25     ...

26 7. Movant may offer and provide Debtor with information re: a potential Forbearance  
27 Agreement...However, Movant may not enforce, or threaten to enforce, any personal  
liability against Debtor as Debtor's personal liability is discharged in this bankruptcy  
case.  
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*See, RJN, Exhibit 2; see also, Court's Docket No. 22.*

2 Consistent with the Court's order granting Relief from stay, National Default Servicing  
3 Corporation ("NDSC") as trustee proceeded with foreclosure proceedings against the Subject  
4 Property. (Middlebrooks Decl. ¶¶ 4-6). In connection with the same, as required by California law a  
5 Notice of Default was recorded on or around January 6, 2010. *Id.* at ¶ 7. Additionally, NDSC,  
6 followed the legal steps to conduct the foreclosure which included sending a letter providing notice  
7 to debtor of the debt, the amount, the creditor, and right to dispute the validity of the debt. (*See,*  
8 Exhibit A to Declaration of Debtor in Support of Motion for Contempt, Court's Docket No. 31).  
9 The letter does not demand or otherwise threaten debtor to make any payment in connection with the  
10 subject loan. *See*, Middlebrooks Decl., ¶ 8.

**III. DEBTOR'S MOTION SHOULD BE DENIED IN ITS ENTIRETY SINCE THE ACTIVITY CITED RELATED TO THE FORECLOSURE OF THE SUBJECT PROPERTY**

Plaintiff contends that the letter sent by NDSC violated the discharge order in that it was an attempt to collect a debt against debtor personally. However, Plaintiff has misinterpreted the communication sent in connection with the non-judicial foreclosure.

17 A debtor's discharge provides only for the discharge of the personal liability on notes and  
18 docs not affect any in rem rights a creditor has against the debtor. *Johnson v. Home State Bank* 111  
19 S.Ct. 2150 (1991). In other words, the lien survives the discharge and remains a claim by the  
20 creditor against the property of the debtor, despite the discharge of personal liability.

21 It is evident that the purpose of this section was not to prevent a creditor from exercising  
22 valid in rem rights, but to prevent any actions against property of the debtor acquired after  
23 bankruptcy to satisfy the discharged personal liability. *In re Cortez*, 191 B.R. 174, 178 (9th  
24 Cir.BAP) (1995) [holding that post discharge recordation of deed of trust and foreclosure did not  
25 violate 11 USC § 524].

Notably, in this case, on December 15, 2009, the Court entered an order granting Bank of New York's Motion for Relief From Stay specifically ordering:

1       1. The automatic stay of 11 U.S.C. § 362, shall be terminated effective December 25,  
2       2009 as it applies to the enforcement by Movant of all of its rights in the Real  
3       Property under Note and Deed of Trust, and pursuant to applicable state law;

4       ...

5       7. Movant may offer and provide Debtor with information re: a potential Forbearance  
6       Agreement...However, Movant may not enforce, or threaten to enforce, any personal  
7       liability against Debtor as Debtor's personal liability is discharged in this bankruptcy  
8       case.

9       *See, RJN, Exhibit 2; see also, Court's Docket No. 22.*

10      Subsequently, NDSC, as trustee, proceeded with foreclosure against the Subject Property.  
11     Such action did not violate the Court's discharge order or the order entered on December 15, 2009  
12     since by its own terms such actions were well within the permissible scope of activity. In connection  
13     with the foreclosure, NDSC, as trustee, recorded and served a notice of default, as required under  
14     California law and issued a standard notice to Plaintiff. The letter states "[t]his firm has been  
15     retained to enforce the terms of the above referenced loan...This letter is notice to you, pursuant to  
16     the Fair Debt Collection Practices Act..." *See, Exhibit A to Declaration of Debtor in Support of*  
17     *Motion for Contempt, Court's Docket No. 31.* The letter does not demand payment from debtor or  
18     threaten the same. Indeed, there is no such reference in the letter.

19      There was no intention on the part of EMC either directly or indirectly to willfully, or  
20     otherwise, violate the discharge order or the Court's December 15, 2009 order. Plaintiff refers to  
21     one letter she received from NDSC dated January 13, 2010. The series of events leading up to this  
22     letter demonstrate that the letter was sent in the course, and as matter of procedure, to facilitate and  
23     conclude the foreclosure against the Subject Property. In that respect, relief from stay was sought  
24     and granted in connection with the enforcement of the subject security interest in connection with  
25     the Subject Property. EMC notes that Plaintiff does not reference any action undertaken by it in  
26     between the time of discharge, in October of 2009, through the time relief from stay was granted and  
27     foreclosure against the Subject Property was expressly permitted by the Court. Rather, subsequent  
28     to the issuance of the order, foreclosure proceedings were commenced. In that regard, the legal

1 framework governing nonjudicial foreclosures or trustee's sales is found in California Civil Code  
2 Sections 2924 – 2924i, which is the “the comprehensive statutory framework established to govern  
3 nonjudicial foreclosure sales” and “is intended to be exhaustive.” *Moeller v. Lien*, 25 Cal. App. 4th  
4 822, 834 (1994); *see also Homestead Sav. v. Darmiento*, 230 Cal. App. 3d 424, 432-433 (1991).  
5 That statutory scheme specifically provides that the foreclosure process may be conducted by the  
6 “trustee, mortgagee or beneficiary or any of their authorized agents” and a person authorized to  
7 record the notice of default or the notice of sale includes “an agent for the mortgagee or beneficiary,  
8 an agent of the named trustee, any person designated in an executed substitution of trustee, or an  
9 agent of that substituted trustee.” Cal. Civ. Code §2924(a)(1) and 2924b(b)(4) (emphasis added);  
10 *see also Moeller*, 25 Cal. App. 4th at 830 (“Upon default by the trustor, the beneficiary may declare  
11 a default and proceed with a nonjudicial foreclosure sale.” (emphasis added)).

12 Consequently, in connection with the foreclosure sale, NDSC, as trustee, caused to be  
13 recorded a Notice of Default and issued a letter providing notice to debtor of the debt, the amount,  
14 the creditor, and right to dispute the validity of the debt. (See, Exhibit A to Declaration of Debtor in  
15 Support of Motion for Contempt, Court's Docket No. 31). For all intents and purposes, EMC firmly  
16 believed that such actions were consistent with the Court's order expressly permitting enforcement  
17 of the subject security interest by way of foreclosure against the Subject Property. Therefore, there  
18 was no intention or bad faith conduct undertaken by EMC in connection with the enforcement of the  
19 security interest. The letter relied on by Debtor contains absolutely no language specifically  
20 demanding payment from Debtor, nor does the letter contain language threatening Debtor to tender  
21 payment. To the contrary, the letter is merely a standard notice sent as a result of proceeding  
22 forward with the foreclosure sale of the Subject Property. Accordingly, a finding of contempt  
23 against EMC is not warranted. *See, Diamontiney v. Borg*, 918 F.2d 793, 797 (9th Cir.1990) (stating  
24 that application of contempt should be applied based on reasonable interpretation of court's order).

25 Furthermore, since the Motion should be denied, Debtor is likewise not entitled to damages  
26 in a sum of \$5,000 for attorney's fees.

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1           **IV. CONCLUSION**

2           For the foregoing reasons, EMC respectfully requests that the Court deny Plaintiff's Motion  
3 and not issue sanctions against EMC.

4           DATED: May 21, 2010

ADORNO YOSS ALVARADO & SMITH  
A Professional Corporation

6           By: /s/ S. Christopher Yoo

JOHN M. SORICH  
S. CHRISTOPHER YOO  
Attorneys for Respondent  
EMC MORTGAGE CORPORATION

## **DECLARATION OF SHARI MIDDLEBROOKS**

I, Shari Middlebrooks, declare as follows:

1. I am Assistant Vice President of EMC Mortgage Corporation (“EMC”). EMC is the servicer of the subject loan, attorney in fact, and the custodian of the same for The Bank of New York Mellon Formerly Known as the Bank of New York as successor Trustee to JPMorgan Chase Bank, N.A. as trustee for the Certificateholders of Structured Asset Mortgage Investments II Trust 2004-AR7 Mortgage Pass-Through Certificates, Series 2004-AR7 (“Bank of New York”). I am competent to testify of my own personal knowledge, to the best of my recollection, as to the matters set forth in this Declaration. I have reviewed my files and the business records of EMC Mortgage Corporation (“EMC”) as they pertain to this matter, and I am the one in control of the files with respect to this matter.

2. As Assistant Vice President, I monitor and oversee loans and/or properties that have resulted in litigation. The business records relating to any loans serviced by EMC are within my custody and control and maintained under my supervision and direction. EMC as the servicer of the subject loan is responsible for the maintenance, custody and control of the loan records and files, which files and records ultimately included records from the loan application process whether or not a loan was actually made in response to an application through foreclosure.

3. All loan documents relating to the subject loan are within my custody and control and maintained under my supervision and direction. Those documents contain entries made in the ordinary course of business at or about the time of the events reflected therein occurred. Specifically, all documents relating to any loan made in connection with the property located at 49 Ashford Avenue, Mill Valley, California ("Subject Property") are now within my custody and control and maintained under my supervision and direction. Those documents contain entries made in the ordinary course of business at or about the time of the events reflected therein occurred.

4. On or about October 7, 2009, Bank of New York filed a Motion for Relief from Automatic Stay (“Motion for Relief”) in connection with the subject loan. (Request for Judicial Notice (“RJN”), Exhibit 1; *see also*, Court’s Docket No. 14). Pursuant to the Motion for Relief from Automatic Stay, Bank of New York requested relief from the automatic stay to enforce its rights

under the subject loan and deed of trust against the Subject Property. *Id.*

2       5. The Motion for Relief From Automatic Stay was heard on November 25, 2009 and  
3 the Court granted the Motion. (RJN, Exhibit 2; *see also*, Court's Docket). On December 15, 2009,  
4 the Court entered the order granting the Motion for Relief, *See*, RJN, Exhibit 2; *see also*, Court's  
5 Docket No. 22.

6       6. Consistent with the Court’s order granting Relief from stay, National Default  
7 Servicing Corporation (“NDSC”) as trustee proceeded with foreclosure proceedings against the  
8 Subject Property.

9       7. In connection with the same, as required by California law a Notice of Default was  
10 recorded on or around January 6, 2010. Additionally, NDSC, followed the legal steps to conduct the  
11 foreclosure which included sending a letter providing notice to debtor of the debt, the amount, the  
12 creditor, and right to dispute the validity of the debt. (*See*, Exhibit A to Declaration of Debtor in  
13 Support of Motion for Contempt, Court's Docket No. 31).

14        8.      The subject letter does not demand or otherwise threaten debtor to make any payment  
15      in connection with the subject loan.

16        9. At all times relevant, the actions undertaken in connection with the Subject Property  
17 were taken in order to effect foreclosure against the Subject Property only and not against the debtor.

18 I declare under penalty of perjury under the laws of the State of California that the foregoing  
19 is true and correct.

20 Executed this 24<sup>th</sup> day of May 2010, at Lewisville, Texas

Shari Middlebrooks  
SHARI MIDDLEBROOKS

1 PROOF OF SERVICE

2 STATE OF CALIFORNIA, COUNTY OF ORANGE

3 Stuart v. EMC

4 USBK – Northern Case No.: 09-11901

5 I am employed in the County of Orange, State of California. I am over the age of 18 years  
6 and not a party to the within action. My business address is ADORNO YOSS ALVARADO &  
7 SMITH, 1 MacArthur Place, Santa Ana, CA 92707.

8 On May 24, 2010, I served the foregoing document described as **OPPOSITION TO DEBTOR'S  
MOTION FOR SANCTIONS AND FOR CONTEMPT FOR VIOLATION OF DISCHARGE  
INJUNCTION AND COURT ORDER; AND DECLARATION OF SHARI  
MIDDLEBROOKS IN SUPPORT THEREOF** on the interested parties in this action.

- 9  by placing the original and/or a true copy thereof enclosed in (a) sealed envelope(s),  
10 addressed as follows:

11 SEE ATTACHED SERVICE LIST

- 12  **BY REGULAR MAIL:** I deposited such envelope in the mail at 1 MacArthur Place, Santa  
13 Ana, California. The envelope was mailed with postage thereon fully prepaid.

14 I am "readily familiar" with the firm's practice of collection and processing correspondence  
15 for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary  
course of business. I am aware that on motion of the party served, service is presumed invalid  
if postal cancellation date or postage meter date is more than one (1) day after date of deposit  
for mailing in affidavit.

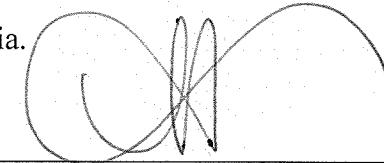
16 **BY THE ACT OF FILING OR SERVICE, THAT THE DOCUMENT WAS  
PRODUCED ON PAPER PURCHASED AS RECYCLED.**

- 17  **BY FACSIMILE MACHINE:** I Tele-Faxed a copy of the original document to the above  
18 facsimile numbers.
- 19  **BY OVERNIGHT MAIL:** I deposited such documents at the Overnite Express or Federal  
20 Express Drop Box located at 1 MacArthur Place, Santa Ana, California 92707. The envelope  
was deposited with delivery fees thereon fully prepaid.
- 21  **BY PERSONAL SERVICE:** I caused such envelope(s) to be delivered by hand to the above  
22 addressee(s).

- 23  (Federal) I declare that I am employed in the office of a member of the Bar of this Court, at  
whose direction the service was made.

24 Executed on May 24, 2010, at Santa Ana, California.

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26 MICHELLE E AULT



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**SERVICE LIST**  
Stuart v. EMC  
USBK – Northern Case No.: 09-11901

**Oceana R Stuart**  
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Debtor

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*U.S. Trustee*